**Tentative Rulings for June 12, 2012**
**Departments 402, 403, 501, 502, 503**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**

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| **08CECG02368** | ***Biondi v. Olmos*** **(Dept. 502)** |
| **09CECG03677** | ***Magallon v. Tiffin Loader Crane*** **(Dept. 502)** |
| **10CECG02241** | ***Lockwood v. Casas*** **(Dept. 503)** |

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**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

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**(Tentative Rulings begin at the next page)**

(20) **Tentative Ruling**

Re: ***Cotter v. American General Assurance Co., et al.***, Superior Court Case No. 10CECG02215

Hearing Date: **June 12, 2012 (Dept. 402)**

Motion: (1) Plaintiff's Motion for Summary Adjudication
(2) American General Assurance Co.'s Motion for Summary Judgment/Adjudication
(3) Educational Employees Credit Union's Motion for Summary Judgment/Adjudication

**Tentative Ruling:**

To grant plaintiff's motion for summary adjudication of the fourth cause of action of the First Amended Complaint. Code Civ. Proc. § 437c(f)(1).

To deny AGAC's motion in its entirety. Code Civ. Proc. § 437c(c), (f)(1).

To deny EECU's motion for summary judgment. Code Civ. Proc. § 437c(c). To grant summary adjudication of the third, fourth and ninth causes of action, but to deny as to the fifth, seventh and eighth causes of action. Code Civ. Proc. § 437c(f)(1).

**Explanation:**

**Plaintiff's Motion for Summary Adjudication**

Plaintiff moves for summary adjudication that American General Assurance Co. breached the policy when it denied plaintiff's claim for benefits under the fare paying passenger benefit.

The policy includes a "Fare Paying Passenger Benefit" provision under which the insured would be paid double the supplemental benefit "for loss which results from an accidental bodily injury which occurs while the covered person is a **fare paying passenger** in a public conveyance operated by a licensed common carrier. The increased amount will be equal to the covered person's Full Benefit Amount and will be paid in addition to the full benefit amount." UMF 12 (emphasis added).

Plaintiff's deceased husband (decedent) was a wildlife biologist employed by the California Department of Fish & Game ("DFG"). DFG contracted with Landells Aviation to fly DFG personnel in helicopters to perform wildlife surveys and large mammal captures. UMF 3-4, 7. Decedent was killed when the Landells Aviation helicopter in which he was a passenger conducted wildlife survey crashed. UMF 8.

AGAC denied benefits under the fare paying passenger benefit, contending that decedent was not a fare paying passenger. UMF 13, 14. The policy does not define "fare paying passenger," and in response to a production demand, AGAC could find no documents that define or refer to the phrase. UMF 15.

AGAC's position is that decedent was not a fare paying passenger because no one paid an established legal per-passenger fare for his travel on the helicopter. AGAC UF 11-26. AGAC focuses on the fact that in DFG's contract with Landells Aviation, there was no specific payment for individual passengers, and Landells Aviation did not take into account fares for individual passengers in preparing the bid for the contract. AGAC UF 15, 16, 21. Rather than paying for individual passengers, Landells Aviation billed DFG for flight or rotor time. AGAC UF 16, 17.

The interpretation of an insurance policy, like any contract, is a question of law. Any ambiguities in the policy are construed in favor of the insured. *National Union Fire Ins. Co. v. Lynette C.* (1991) 228 Cal.App.3d 1073, 1077.

Contract terms should be understood "in their ordinary and popular sense, rather than according to their strict legal meaning …" Civ. Code § 1644. The words used in an insurance policy are construed in their ordinary and popular sense. *National Union Fire Ins. Co., supra,* 228 Cal.App.3d at 1078. Ambiguity should be interpreted most strongly against the drafter. Civ. Code § 1654. "[W]here the policy language is ambiguous, the policy will be interpreted according to the reasonable expectations of the insured." *Unetco Indus. Exch. v. Homestead Ins. Co.* (1997) 57 Cal.App.4th 1459, 1465. "[W]hen an ambiguity remains unresolved after considering the policy's language and context, and the parties' objectively reasonable expectations, then the ambiguity is resolved against the insurer and in favor of coverage." *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 327.

Resolution of the fourth cause of action depends on whether, under the facts of this case, decedent was a "fare paying passenger." The phrase is not defined anywhere in the policy, and in discovery AGAC could produce no documents that define or describe what a "fare paying passenger" is.

Inasmuch as the court is to interpret the policy terms in their ordinary and popular sense (Civ. Code § 1644), the court takes judicial notice of various dictionary definitions of the term "fare". See *Golden Security Thrift & Loan Assn. v. First American Title Ins. Co.* (1997) 53 Cal.App.4th 250, 256. Black's Law Dictionary (2nd ed.) defines "fare" as "money paid for a passage either by land or by water … The price of passage or the sum paid or to be paid for carrying a passenger." Plaintiff refers to other definitions that she contends show that a fare is popularly understood to be a contribution to the operational costs of the transport system involved.

- Webster's Online Dictionary: "The price of passage or going; the sum paid or due for conveying a person by land or water; as, the fare for crossing a river; the fare in a coach or by railway."
- Oxford Dictionaries Online: "the money a passenger on public transportation has to pay."
- The Free Dictionary: "1. A transportation charge, as for a bus. 2. A passenger transported for a fee."
- Dictionarist: "cost for traveling (on a bus, train, etc.); one who pays to travel in such a vehicle".

See Cornwell Dec. Exh. L.

Plaintiff's position, that "fare paying" involves a any payment for providing transportation", is consistent with these definitions. DFG contracted with Landells Aviation to provide helicopter transportation to its personnel when conducting wildlife surveys and captures. Nothing in these definitions, or in the insurance policies, suggests that a payment is only a "fare" if it is calculated on a per-person basis. There is nothing inherent in the use of the term "fare" that suggests that it cannot be calculated based on flight or rotor time.

Case law cited by AGAC in its opposition does not compel a contrary conclusion. AGAC relies on *Krause v. Pacific Mut. Life Ins. Co. of California* (1942)141 Neb. 844, overruled on other grounds by *D & S Realty, Inc. v. Markel Ins. Co.* (2010) 280 Neb. 567, where the Nebraska Supreme Court held that the common sense interpretation of "fare paying passenger" is the passenger who pays the legal fare. The insurance policy at issued excluded coverage so far as airplane accidents are involved, but provides as an exception in the case of an insured "actually riding as a fare paying passenger." The question was whether the insured was a "fare paying passenger". The insured was on an $8 trip pass that he paid for in cash. Regularly established fare for the trip would have been $94.03. With the trip pass, the passenger assumed the obligation of leaving the plane upon request by the carrier, and also assumed all risk of accident and personal injury. Under these facts the court was doubtful that such a passenger could be said to actually be riding as a fare paying passenger. *Id.* at 848-849.

*Krause* is distinguishable, as the contract between DFG and Landells Aviation included no such waiver of liability, and Landells Aviation was paid the full contracted-for price for the helicopter transportation.

AGAC cites to *Burns v. Mut. Ben. Life Ins. Co. of Newark, N.J.* (W.D. Mich. 1948) 79 F. Supp. 847, where the insured and other military personnel were on an authorized flight in an army plane, and did not pay for his transportation. The plane exploded and fell, and all passengers were killed. The insurance policy at issue included an aerial flight exception, with a "fare-paying passenger" exception. Specifically, the exception applied "if the insured at the time of such flight shall be a fare-paying passenger in course of transportation form one definite terminal to another by means of an aerial conveyance in charge of a licensed Pilot." *Id.* at 853. In finding that the insured was not a fare-paying

passenger, the court cited to *Krause* for the proposition that "[a] fare-paying passenger is one who pays the established legal rate of fare." *Id.*

The court stated that "[t]he insured's transportation may have been an expense to the army, but that fact did not make him a fare-paying passenger within the ordinary and generally accepted meaning of that term as used in the aviation clause of the policy." *Id.* at 853. The court construed the clause to "refer[] only to commercial flights, that is, fare-paying flights on commercial airlines operating between definitely established airports on established airline routes. *Id.* The insured was not killed in the course of transportation from one definite terminal to another. Nor was the troop carrier pilot licensed by the civil aeronautics administration of the United States Department of Commerce. *Id.* at 854. Thus, the insured was not a fare-paying passenger under the terms of the exception to the aerial flight exclusion. *Id.*

*Burns* is also distinguishable. In this case, the fare-paying passenger benefit (unlike the fare paying passenger exception to the flight exclusion) is not restricted to aircraft flown by a licensed pilot and to flights regularly scheduled between established airports. And decedent in this case died on a commercial (as opposed to military) flight on a licensed craft flown by a licensed common carrier. And as plaintiff points out in her Reply brief, courts in other jurisdictions disagree with *Burns* and reached the exact opposite conclusion. See *Quinones v. Life & Casualty Ins. Co.* (1945) 24 So.2d 270, 271.

Resolving doubts as to the meaning of the policy against the insurer and in favor of coverage (*Acceptance Ins. Co., supra,* 69 Cal.App.4th at 327; *National Union Fire Ins. Co., supra,* 228 Cal.App.3d at 1077), the court finds that inasmuch the carrier was fully compensated as bargained for to transport DFG personnel, decedent was a fare paying passenger. Therefore, AGAC breached the policy by withholding $250,000 under the fare paying passenger benefit.

Finally, the court notes that AGAC's objections numbers 1 and 2 are overruled, and objection number 3 is sustained. Plaintiff has not filed any objections to evidence in conformity with Cal. Rules of Court, Rule 3.1354(b).

**AGAC's Motion**

The first cause of action alleges breach of the covenant of good faith and fair dealing with respect to Policy 1, issued by AGAC to decedent through his membership in Golden 1 Credit Union. AGAC contends that it properly denied plaintiff's claim for benefits under this policy because decedent was not a "fare paying passenger".

As noted above, the court finds that decedent was a "fare paying passenger." The first cause of action potentially implicates an additional issue, as the exclusion requires that the flight be "regularly scheduled between established airports." In contrast, the double indemnity "fare paying passenger" benefit applies to "a fare paying passenger in a public conveyance operated

by a licensed common carrier." See UMF 4, 5. Based on the nature of the flights the decedent was taking, it may be that the "fare paying passenger" exception to the exclusion does not apply because the flight was not regularly scheduled between established airports. But AGAC's only argument made in relation to the first cause of action is that decedent was not a fare paying passenger because he did not pay a fare or travel on a pass. See Notice of Motion 2:21-3:2; AGAC's Points & Authorities 9:19-21. The court cannot grant a motion based on grounds not articulated or supported by the evidence.

AGAC does not submit evidence showing that the flight was not "regularly scheduled between established airports." In support of this contention, AGAC cites to the Russell More deposition at 62:6-19, which is attached as Exh. C to the Brisbin Dec. Mohr's deposition is found at Exh. C, but the exhibit is an out-of-order jumble of deposition transcript pages, which don't appear to include page 62. AGAC's UMF 33 states that AGAC denied plaintiff's claim for AD&D benefits under Policy 1 pursuant to exclusion #8 of the policy, referencing Brisbin Dec. ¶ 3, Exh. B. That representation of the evidence is not accurate. The 10/5/10 letter denies benefits under Policy 2, not Policy 1, regarding which plaintiff had already filed suit. The letter addresses the "fare paying passenger" issue only in the context of explaining that coverage under the fare paying passenger double indemnity benefit of Policy 2 was denied because decedent "was not a fare paying passenger on the helicopter in which he was riding …" It does not appear that coverage was denied because "the flight [was not] regularly scheduled between established airports".

Thus, summary adjudication of the first cause of action should be denied because the only argument advanced or supported by the evidence is that plaintiff was not a "fare paying passenger", and as addressed above with respect to plaintiff's motion, the court finds that decedent was a "fare paying passenger".

AGAC requests summary adjudication of the second cause of action for breach of contract based on the same arguments, and the request is denied for the same reasons.

The third and fourth causes of action are for breach of covenant of good faith and breach of contract with regards to Policy 2, the policy obtained through EECU. Since the issue is whether decedent was a "fare paying passenger" for purposes of the double indemnity benefit, the requested adjudications are denied as addressed above.

In the ninth cause of action for declaratory relief, plaintiff requests a declaration that benefits are payable under both AGAC Policy 1 and Policy 2. When a defendant seeks summary judgment in a declaratory relief action, "the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for

declaratory relief." *Gafcon, Inc. v. Ponsor & Assoc.* (2002) 98 Cal.App.4th 1388, 1402.

AGAC contends that summary adjudication of the cause of action should be granted because decedent was not a fare paying passenger. Since the Court finds that he was, the motion should be denied as to the ninth cause of action as well.

AGAC seeks summary adjudication of the fifth cause of action for fraud in the inducement, sixth cause of action for estoppel to deny coverage, seventh cause of action for negligent misrepresentation, and eighth cause of action for false promise, contending that plaintiff cannot show that decedent possessed a copy of the brochure when he applied for coverage, and the brochure states that the policy contains the full conditions of the insurance contract.

The elements of fraud are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.

The elements of a cause of action for negligent misrepresentation are: (1) The defendant must have made a representation as to a past or existing material fact; (2) The representation must have been untrue; (3) Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true; (4) The representation must have been made with the intent to induce plaintiff to rely upon it; (5) The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation; and (6) As a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage. *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 785-786.

The fifth through eighth causes of action are based on the publication of a brochure, apparently by EECU, marketing the AD&D coverage to EECU members. The brochure gave a summary of exclusions, in at least one particular in a manner inconsistent with the actual policies, stating that no benefits are payable for loss resulting from travel or flight as a pilot or crew member in any kind of aircraft. See Brisbin Dec. Exh. A, Cotter Deposition, Exh. 11 thereto. The brochure's summary contains a material misrepresentation of the policies' terms and exclusions.

Both policies issued by AGAC include the same double indemnity supplemental benefit "for loss which results from an accidental bodily injury which occurs while the covered person is a fare paying passenger in a public conveyance operated by a licensed common carrier. The increased amount will be equal to the covered person's Full Benefit Amount and will be paid in addition to the full benefit amount." UMF 4, 10.

Both policies also include the same exclusion:

> No benefits will be paid for any loss that results from or is caused … by any of the following: … flight in any type of aircraft, unless the insured is traveling as a fare paying passenger; or on a pass, and if: the aircraft is licensed to carry passengers; the carrier is licensed to fly such aircraft; the aircraft is flown by a licensed pilot; and the flight is regularly scheduled between established airports.

UMF 5.

Summary adjudication of these causes of action is sought on the grounds that "Plaintiff has no evidence to show the deceased saw or relied on the brochure before applying for the AD&D coverage." Notice of Motion 3:12-16. The only factual issue addressed in AGAC's separate statement is whether or not decedent or plaintiff saw the brochure or communicated with AGAC about the AD&D coverage before issuance of the policy. Accordingly, some of the other issues raised by AGAC in the points and authorities and reply brief (i.e., AGAC did not draft, issue or approve the brochure) should not be considered due to lack of notice and failure to set forth the relevant facts in the separate statement (Code Civ. Proc. § 437c(b)(1)).

Summary adjudication is sought first on the ground that there is no evidence that decedent saw the brochure in which the allegedly false representations were made. UMF 38.

There is no direct evidence showing that decedent received or saw the brochure. But summary judgment cannot be granted solely because the opposing party's evidence is only circumstantial. "The presence of (reasonable) inferences supporting a judgment in favor of plaintiff is sufficient to defeat a summary judgment in favor of defendant." *Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1059 (parentheses added). The Court finds that plaintiff has presented evidence sufficient to raise a triable issue with regards to whether decedent saw or relied on the EECU marketing brochure. See Plaintiff's Additional Facts 30-44.

Second, apparently to show lack of justifiable reliance, AGAC argues that, even if decedent did see the brochure, it clearly stated that the exact terms are contained in the group policy and the policy language controls if there are any discrepancies between the brochure and policy. UMF 39. But AGAC cites to no legal authority in support of its argument that this statement in the brochure shields AGAC from a claim for fraudulent inducement.

Plaintiff contends that deceptive marketing materials cannot mislead and then be shielded from scrutiny because correct information is available elsewhere, citing *Williams v. Gerber Products Co.* (9th Cir. 2008) 523 F.3d 934, 939-940. *Williams* was a class action unfair competition (Bus. & Prof. Code § 17200) claiming that Gerber deceptively marketed its "Fruit Juice Snacks". The appellate court overturned the district court's ruling granting a motion to dismiss,

finding that the packaging was likely to deceive a reasonable consumer. The court "disagree[d] with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. … We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception." *Id.* at 939-940.

AGAC argues that this case is distinguishable because the marketing brochure clearly states that the full terms and conditions of the coverage are in the policy, unlike the fruit snack package that did not contain a statement that the parent should read the ingredients listed to ascertain the content of the package.

That's true, but in a way, plaintiff's case here is stronger than that of the plaintiffs in *Williams*, where the ingredient list was found on the same package as the misleading representations about the snack's contents/ingredients. Here, the summary of the exclusions on the EECU brochure were misleading (at least, as relevant, with respect to the aircraft death exclusion). An EECU member could not read the brochure's summary of exclusions and then turn it over and read the actual exclusions on the same document. Moreover, plaintiff provides evidence with the opposition that the master policy was not readily available and the certificates of insurance are not issued until after a prospective purchaser submitted enrollment paperwork and is insured. Plaintiff's Additional Fact 28. Accordingly, the decedent, if he read the brochure, likely would have relied on the summary of exclusions, without the immediate opportunity to review the actual exclusion or terms of the policy.

Accordingly, AGAC's motion for summary adjudication of the fifth through eighth causes of action cannot be granted.

Finally, the court notes that AGAC's objection 7 is sustained, while objections 1-6 and 8-22 are overruled.

**EECU's Motion**

Summary adjudication of the third cause of action for breach of covenant of good faith and fair dealing, fourth cause of action for breach of contract, ninth cause of action for declaratory relief, is granted on the ground that these causes of action seek to enforce obligations under a contract, Policy 2, to which EECU was not a party.

The elements of a cause of action for breach of contract are the existence of the contract, plaintiff's performance or excuse for nonperformance, defendant's breach, and damages. *Oasis West Realty, LLC* v. *Goldman* (2011) 51 Cal.4th 811, 821.

> "The prerequisite for any action for breach of the implied of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49 [275 Cal. Rptr. 17].) The covenant does not exist independently of the underlying contract. (*Spinks v. Equity Residential Briarwood Apts.* (2009) 171 Cal.App.4th 1004, 1033 [90 Cal. Rptr. 3d 453].)

*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 711-712. "Without a contractual relationship, [a plaintiff] cannot state a cause of action for breach of the implied covenant." *Smith, supra*.

Plaintiff admitted that no contract exists between herself or decedent and EECU. UMF 6-7. AGAC provides coverage under the policy and would pay benefits owed under the policy. UMF 1, 6-7. The only thing EECU agreed to provide was payment of the cost of the basic benefit (Plaintiff's Additional Fact 4), and there is no contention that AGAC did not do so. AGAC, not EECU, made the decision regarding plaintiff's claim for benefits. UMF 28-30. The fact that EECU marketed the insurance does not make it the insurer.

Plaintiff contends that to the extent EECU is deemed to be AGAC's agent in distributing the brochure and marketing the program, EECU can be held separately liable under the insuring contract, because EECU's name is on the brochure, but the insurance company is not identified, citing *Otis Elevator Co. v. Berry* (1938) 28 Cal.App.2d 430.

*Otis Elevator* is clearly distinguishable. In that case, a corporate officer signed a contract on behalf of the corporation with the plaintiff. The contract was addressed to the corporation but the officer signed the contract with his own name and without qualification. The court held that the officer was a party to the contract and liable under the contract in addition to the corporation because aside from the address there was no reference to the corporation, and there was no clause in the contract indicating that the officer was acting in a representative capacity.

In this case, the contract is the insurance policy, and plaintiff admits and understood that EECU was not the insurer. EECU is not referenced in the policy documents themselves. To the extent that plaintiff sues for denial of benefits under the policy issued by AGAC, it must look to AGAC.

In the cause of action for breach of the covenant, plaintiff contends that EECU acted in bad faith by not promptly arranging payment to plaintiff of the $3,000 basic benefit. But since EECU was not the insurer and did not make the decisions regarding plaintiff's claims for benefits under the insurance policy, EECU cannot be held to have acted in bad faith in denying or delaying payment of benefits under the insurance policy.

Accordingly, I would grant summary adjudication of the third and fourth causes of action.

The motion should be granted as to the ninth cause of action as well. When a defendant seeks summary judgment in a declaratory relief action, "the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor. It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief." *Gafcon, Inc., supra,* 98 Cal.App.4th at 1402. Based on the above, plaintiff is not entitled to the declaration she seeks against EECU. Based on the above, plaintiff is not entitled to the declaration she seeks against EECU.

As noted above, the fifth, seventh and eighth causes of action are fraud based, and based on EECU's publication of the brochure that misrepresents the policy's actual exclusions.

In moving for summary adjudication, EECU argues that the brochure was for marketing purposes only, discussing an available program and even stated that the actual insurance policy would contain the full terms and conditions of the coverage. UMF 34, 35. Therefore, a review of the policy was necessary to ascertain the complete terms of the coverage.

Like AGAC, EECU attacks plaintiff's evidence that decedent saw the brochure as pure speculation. But again, the Court finds the evidence sufficient to raise a triable issue as to whether decedent saw and justifiably relied on the brochure.

The question is whether EECU can be held liable for misrepresentations in the brochure that was prepared by or for EECU. The only entity identified on the brochure is EECU. It states that EECU made arrangements to provide $3,000 in AD&D insurance. See Brisbin Dec. Exh. A, Cotter Deposition, Exh. 11 thereto. In the exclusions summary, the EECU brochure states that "[n]o benefits are payable for loss resulting from … travel or flight as a pilot or crew member in any kind of aircraft." *Ibid.* This explanation of the death by aircraft exclusion clearly is *not* accurate. The exclusion actually states: "No benefits will be paid for any loss that results from or is caused … by any of the following: … flight in any type of aircraft, unless the insured is traveling as a fare paying passenger; or on a pass, and if: the aircraft is licensed to carry passengers; the carrier is licensed to fly such aircraft; the aircraft is flown by a licensed pilot; and the flight is regularly scheduled between established airports."

Despite the fact that EECU's Member Insurance Administrator had the responsibility to review the marketing materials to ensure they were accurate, and did review the brochure and compare it to the terms of the form certificate of insurance (Plaintiff's Additional Facts 28-30), the brochure was published with a misrepresentation of the aircraft death exclusion.

And given decedent's occupation, it is highly likely that he relied on the explanation of exclusions in the brochure in deciding whether to obtain the insurance, supplemental benefit and double indemnity. See Plaintiff's Additional Fact 26. Accordingly, summary adjudication cannot be granted as to these fraud-based causes of action.

EECU's objection 7 is sustained, and objections 1-6 and 9-26 are overruled.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: JYH on 6/11/12.**
(Judge's initials) (Date)

**Tentative Ruling**

Re: ***Hogopyan v. Farmer's Ins. Group, et al***
Superior Court Case No. 11CECG02923

Hearing Date: June 12, 2012 (**Dept. 503**)

Motion: By defendant Yepremian to compel initial response from Roza Hagopyan to set for RFPs and set 6 form interrogatories and from Seda Galoyan to set 10 form interrogatories; for $660 in monetary sanctions in connection with each motion

**Tentative Ruling:**

To grant motion and order plaintiffs to serve complete response, without objection, to each of the three sets of discovery at issue here, within 10 days of service of this order; to deny the request for sanctions.

**Explanation:**

These three motions relate to discovery served on Roza Hagopyan and Seda Galoyan on February 22 and 28, 2012. The February 22nd discovery was a set 4 RFPs directed at Roza; the February 28th discovery was set 6 form interrogatories directed at Roza and set 10 form interrogatories directed at Seda.

The only form interrogatories checked on the copies attached to the moving papers is #17, seeking all facts, witnesses and documents supporting the response to any RFA not unequivocally admitted, though the request doesn't identify which about which set of RFA's the request is directed. The RFPs ask for documents supporting allegations in particular paragraphs of plaintiffs' complaint.

Mr. Greene states in the supporting declarations in connection with each motion that no responses were received when due and no extensions were granted. In addition to seeking an order compelling response without objections, he again seeks monetary sanctions of $660 in connection with each of the three motions, representing 2 hours he claims to have spent preparing each motion, 1 hour anticipated for a reply to each, and 1 hour anticipated for attendance at a hearing.

It's relatively clear that Arpi Yepremian is entitled to a complete response to each set of discovery for which no responses have been received. What's not clear is how the set 10 form interrogatories directed at Seda that are the subject of these motions differs from the set 7 and 8 form interrogatories that were the subject of the motions heard on May 9, 2012, both of which also related to question #17, or how the current motion seeking response from Roza to form

interrogatories set #6 differs from the motion heard on April 19, 2012 relating to form interrogatory set #2, since both address form interrogatory #17.

It appears from review the volume of motions that have been filed, that Mr. Greene has unnecessarily stretched what should have been a single set for form interrogatories into several separate sets of form interrogatories, some of which are duplicative of prior sets, for no apparent reason other than possibly to seek additional sanctions against plaintiffs by bringing numerous separate discovery motions.

Similarly, the motion seeking response to the RFPs, while not obviously a duplication of previous motions, doesn't explain why all the RFPs weren't included in a single set with a single motion to compel response. Yepremian has already obtained monetary sanctions against these plaintiffs for failure to respond to the same type of discovery broken up into numerous separate sets, without any explanation or apparent justification for barraging both plaintiffs and the court with discovery and motions that could have been addressed more efficiently and without unnecessarily wasting court resources if they were consolidated into single sets and single motions.

The court will therefore grant the underlying relief requested and order plaintiffs to provide complete response, without objection, to each set of discovery at issue here within 10 days of service of this order. But it will deny the request for sanctions since moving counsel hasn't offered any explanation of why the RFPs and form interrogatories at issue here weren't included in a single set of RFPs or form interrogatories and why it was "necessary" to bring so many separate motions each of which seek to recover fees for excessive hours that appear to have been unnecessarily spent.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling Issued By:** **A.M. Simpson** (Judge's initials) **on** **6-11-12** (Date).

(19) **Tentative Ruling**

Re: ***McDowell v. Me-N-Eds***
Superior Court Case No. 09CECG01500

Hearing Date: June 12, 2012 (Department 402)

Motion: by plaintiffs for class certification and preliminary approval of settlement

**Tentative Ruling:**

To deny without prejudice.

**Explanation:**

**1. Class Certification**

**a. Standards**

The burden of proof for a plaintiff/cross-complainant seeking class certification is preponderance of the evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 322. See also *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test.

> "Code of Civil Procedure section 382 authorizes class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
>
> "Trial courts are accorded great discretion in granting or denying certification . . . As the focus in a certification dispute is on what type of questions—common or individual— to arise in the action, rather than on the merits of the case, in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."

*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97.

**b. Adequacy**

California law holds that, so long as the claims are typical and the class representative displays willingness to engage in the discovery and other requirements of litigation, "the adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

Plaintiffs' counsel does appear to be qualified. However, there is nothing from the named class representatives, no deposition testimony, no declarations. There is no proof at all of their claims, that they are the same claims as raised in the complaint, of their vehicles, their gas mileage, their rate of reimbursement, what work they did on the case, whether they approved the settlement etc. It therefore is not possible to tell if their claims are typical absent such evidence, and their attorney is not qualified to give it.

Adequacy has not been shown.

**c. Predominance of Common Questions**

Absent proof of the claims of the named class members, this too cannot be answered. There is also no admissible evidence about the data given to plaintiffs' counsel, which was used to arrive at answers to allegedly common questions shown therein.

**d. Superiority**

These arguments are persuasive, but there is no admissible evidence of the number of potential class members. The evidence as to the numbers of persons must come from the source – defendants.

**e. Need for Scrupulous Inquiry.**

A court is not allowed to approve a class settlement absent actual proof of a properly certified class. The only difference in proof for class certification for settlement and class certification generally is that the first does not require proof of manageability for trial. But other than that, the burden of proof is on plaintiffs, and must be met, whether certification is sought on its own, or concurrently with settlement approval.

The reason for this is to ensure that due process is met. A class action is a procedural method for adjudicating, or settling, the claims of many via one case. However, the basis for permitting such adjudication or settlement is that the claims of the representatives are typical of the class, and that the representatives are scrutinized to ensure their interests and those of the class they seek to represent are sufficiently similar.

The leading case on this issue is *Amchem Products v. Windsor* (1997) 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed 2d 689. Justice Ginsburg wrote that opinion, and she was joined by Justices Scalia, Kennedy, Souter, Thomas, and then Chief Justice Rehnquist. The defendants in that case were companies facing asbestos liability, who wanted to completely, globally, settle all possible claims against them. The Court was mindful of the crisis such companies faced in terms of potential financial burdens inherent with liability on those claims. But it refused to allow the class certification, and therefore the settlement. The objectors to the settlement contended that the named plaintiffs and certain unnamed class members had conflicts of interest, and that counsel did as well in seeking to represent all. This was because the named class members all had manifested injuries from asbestos exposure, while the class certified included persons who did not.

"We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." (*Id*. at 619.) "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." (*Id*. at 620.)

The Court's role is more pronounced than the usual matter, as the Court is the guardian of the rights and interests of unnamed class members. See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129: "The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." "The district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re Warfarin Sodium Antitrust Litig*. (3rd Cir. 2004) 391 F.3d 516, 534.

Proof of all class certification requirements but for manageability is required under the United States Constitution. "The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812. The "clause" spoken of is the 14th Amendment to the U.S.

Constitution, the same one that is used to question punitive damage verdicts. See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712.

## 2. Settlement

### a. Same Proof Problems

In *Clark v. America Residential Services* (2009) 175 Cal. App. 4th 785, the Court vacated approval of a class settlement coupled with class certification, the award of $25,000 each to two named plaintiffs, and more. There were 20 objectors. The complaint was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at 793.)

See also *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129: "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at 130.)

Absent proof of the numbers of class members and of the work weeks, such as via a declaration from defendant or discovery admissions from defendant, there is insufficient proof of the reasonableness of the settlement, as the potential maximum recovery is not supported. Evidence is required. The expert evidence impressive, but the basics underlying their opinions is needed, including defense confirmation of just what data was produced and how many class members there are.

### b. No Dismissal Permitted

The settlement agreement requires dismissal with prejudice (2:3), which is not permitted under California law. California Rules of Court, Rule 3.769(h) forbids dismissal of a class action where a judgment is entered pursuant to a settlement. An August 12, 2008 Report from the Civil and Small Claims Advisory

Committee to the Judicial Council makes clear that the rule is intended to bar dismissal completely where a judgment is entered:

> "Following final court approval of a class settlement and entry of judgment, in some cases parties have asked the court to enter dismissal as well. There is no authority, however, for both entry of judgment following settlement and entry of dismissal. In the circumstances of a class settlement, the entry of dismissal, governed by rule 3.770, may be inconsistent with a judgment."

The recommendation was:

> "The Civil and Small Claims Advisory Committee recommends that the Judicial Council effectively January 1, 2009, amend rules 3.796 and 3.770 of the California Rules of Court to provide that on the approval of a class settlement and entry of judgment, a court may not also enter dismissal of the action."

The prior version of the rule did not contain language barring dismissal. The Advisory Committee noted that the point of differentiating a class action from an individual action as that Court approval was needed of any settlement of the former in order to protect absent class members. "Rules prohibiting the concurrent entry of judgment following settlement with retention of jurisdiction and entry of dismissal will advance this purpose."

The report is found at:

http://www.courtinfo.ca.gov/jc/documents/reports/102408itema25.pdf.

Rule 3.770 deals with class action dismissals and reinforces the above.

**c. Scope of Release**

> "[T]here are real dangers in the negotiation of class action settlements of compromising the interests of class members for reasons other than a realistic assessment of usual settlement considerations such as the strength of their legal claims, the desire for immediate rather than delayed relief, and the costs of litigation. Incentives inherent in class-action settlement negotiations that can, unless checked through careful district court review of the resulting settlement, result in a decree in which the rights of class members, including the named plaintiffs may not be given due regard by the negotiating parties. The class members are not at the table; class counsel and counsel for the defendants are. Unlike in the non-class action context, most of class counsel's clients cannot be consulted individually about the terms of the settlement, nor is the resulting decree submitted to the class members for approval (although there is an opportunity to object)."

*Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 959-960.

Newberg on Class Actions notes that "A settlement may properly prevent class members from asserting claims relying upon a different legal theory different from that relied upon in the class action complaint, but depending upon the ***same set of facts***." See same at section 12:15, in the Chapter for "Drafting the Settlement Agreement," emphasis added.

"The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. "A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . ." *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

The release proposed in this matter provides that all claims of any kind for reimbursement of "business expenses" are released. See Settlement Agreement at 8:10-16. It also purports to release all claims that were or could have been raised in the case, "including" those for business expenses. It also includes claims under "Wage Orders," and wages are not a subject of this case.

The sole subject of the case is reimbursement for motor vehicle driving costs. The phrase "Business expenses" is a lot broader than driving expenses, and therefore inappropriate. The release of claims that "could have been" asserted is not justified. (Settlement Agreement at 10:12.) The release must be limited to claims that could have been asserted based on the facts alleged in the pleadings in this matter.

**c. Requirement of Claim Form**

The settlement requires submission of a claim form to get any payment. The agreement requires that the form be executed under penalty of perjury, but the form itself has no language that would fulfill that requirement. Contrast the Settlement Agreement at 20:20-21 with the claim form attached as Exhibit B thereto. The claim form includes an individual release of defendants, which would therefore occur before the settlement is final. No justification was given for the use of a claims made procedure, and same will diminish the amount of settlement funds available for payment to class members. Absent a good purpose for a claims-made procedure, none is preferred.

**d. Claw Back of Settlement Money for Opt-Outs**

In the agreement, at 21:19-27, there is a provision that permits defendants to take out of the class settlement money any funds that might

have due to non-class members who opt out, if the person opting out files suit or an administrative claim.

This provision makes little sense. The settlement fund is for class members only, not for people who decide to opt-out. The settlement agreement already has a "poison pill" provision allowing defendants to pull out if more than 5% of the potential class members opt out. See 19:19-20. Since no settlement funds can be paid to non-class members (the opt-outs), there is no money to claw back for them, and this provision need be removed.

**e. Settlement Administrator Costs**

There is no cap on these and the use of a claim form ensures cost will be much higher than it would be for mere class notice, or sending out a check based on weeks worked in defendants' records. These costs serve to diminish the funds available to the class. See the Settlement Agreement at 24:21-26. A cap should be put in place, and the claim procedure omitted.

**f. Incentive Awards**

The $6,000 to be split among named class representatives may well be reasonable. However, there needs to be an evidentiary foundation, such as declarations by each class representatives as to exactly what they did, and an estimate of how many hours it took them to do so.

Adequate documentation supporting the incentive requested is critical. A request for an incentive award can be reduced or even denied if the basis for the amount sought is not adequately quantified and documented. See e.g. *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299 (court substantially reduced the requested incentive because the representative's participation was not quantified and his expenditures were unspecified); *Aamco Automatic Transmissions v. Tayloe* (E.D. Penn. 1979) 82 F.R.D. 405, 410-411 (incentive reduced in part because there was no support in record for the reasonableness of the hourly rate sought for representative's time); *Montgomery v. Aetna Plywood, Inc*. (7th Cir. 2000) 231 F. 3d 399, 410 (incentive denied in part because counsel did not make a serious argument in support of the incentive, particularly as to the amount merited).

In the present motion, there is inadequate evidentiary showing to support an incentive award for the class representatives.

**g. Personal Jurisdiction Finding**

In the Settlement Agreement, at 14:4-6, it calls for a finding in the final judgment that the Court has personal jurisdiction over all the Settlement Class Members. There may be instances where that is not true, such as where notice is not sent to a class member, their name is not even submitted to the entity mailing notice, or where a class member lives out of state. The existence of personal jurisdiction be governed by the law on class actions and notice.

**h. Injunction**

On page 15, lines 18 -28, the settlement agreement includes a permanent injunction against class members' participation in or receiving benefits or other relief in any other proceeding, including administrative or regulatory ones, that related to the claims or facts underlying this action. That is not appropriate. Should final approval be given, the settlement will be entered as a judgment and act as res judicata. No greater effect or lesser effect will be approved. If the Labor Board desires to take action, defendants are free to make any and every use of the judgment as the law provides, but it is not appropriate to attempt to tie the hands of regulatory agencies by silencing class members.

**i. Opt-Out Procedure**

This is found at 18:28 – 19, and requires that a class member wishing to opt-out incur expenses for certified mail service. That is not proper. If regular mail notice is fine when going to the class member, a regular mail notice to opt-out is fine in response.

**j. Discrepancy in Costs Sought**

The settlement agreement caps costs at $115,000. See 25:4-5. The motion seeks at least $10,000 more than that. The notice to the class does as well (see page 5, paragraph G., of Exhibit A to Exhibit 1.) the figures must be reconciled.

**k. Provision to Suspend Payments**

At 25:24-28 of the Settlement Agreement, it provides that defendant has the discretion to make no payments under the agreement if a governmental agency starts an administrative procedure. What it does not do is state how long that state of suspension will last, or what would trigger its end. The court that payments are to go out after a final judgment is entered, so there could be a release, a judgment, and no payments at all. If defendants wish to back out of the settlement, then the settlement is no more, and a trial date should be set. Either defendants are settling or they are not, no post-judgment escape hatch is approved.

**l. Bar on Evidence**

At 26:8-15, the Settlement Agreement purports to restrict its use as evidence. The law already does so. See Evidence Code section 1152. Any further restriction is not appropriate, as there is no consideration given for it.

**m. Return of Discovery**

At 29:17-19, the Settlement Agreement provides that plaintiffs are to return all documents and electronic information produced by defendants within 30 days after the Final Settlement Date. In general, an attorney has a duty to maintain a client's file. See Cal. St. Bar. Comm. Prof. Resp., Formal Opn. No. 2001-157. The opinion relies on Rules of Professional Conduct, Rule 3-700, which does exclude protected materials, such as confidential documents. The client's file belongs to the client, not the attorney. Here, all class members are the clients. In that situation, only confidential materials can be returned.

**n. Class Notice**

The class notice talks of a payment of $3,750.00 to the California Labor & Workforce Development Agency. There is no adequate explanation for that in the papers for this motion.

**o. Service of Objections**

The class notice requires that any objection be served on California and Minnesota counsel for plaintiffs, and on two different addresses for defense counsel. One address for each side is sufficient.

**p. Final Judgment**

This is Exhibit D to the settlement Agreement. It provides for dismissal (see paragraph 12), which is not permitted. It also purports to make findings as to res judicata and collateral estoppel (see paragraph 14). Those findings are for other courts to make, based on legal principals, not an advisory opinion by this court. The "permanent injunction" is included as part of the final judgment (see paragraph 15), and need be removed. Paragraph 16 permits the parties to modify the stipulation of settlement. Since the stipulation will be entered as a judgment, that is not appropriate.

**3. Conclusion**

The lack of certain evidence and the inclusion of dubious provisions in the settlement agreement are conditions which may be changed. For that reason, the denial of certification and of preliminary approval are made without prejudice to a future motion which addresses the concerns raised herein.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: JYH on 6/11/12.**
(Judge's initials) (Date)

(18)

**Tentative Ruling**

**Re:** ***Mary L. Ventura v. Turning Point of Central California, Inc., et al.***
**Case no. 11CECG02378**

**Hearing Date:** **June 12, 2012 (Dept. 502)**

Motion: By plaintiff, demurer to the fourth affirmative defense in defendant's second amended answer

**Tentative Ruling:**

To sustain with 10 days leave to amend. New or modified allegations are to be set forth in bold typeface.

**Explanation:**

In the fourth affirmative defense defendant pleads that plaintiff failed to mitigate her damages. The defense now states that plaintiff *does not allege* that she addressed her concerns with anyone associated with defendant so she does not demonstrate that she mitigated her damages by trying to resolve her complaints. Though this is factually more developed than previously, there is still a problem with phraseology in that the defense is stated in terms of what plaintiff alleges and does not allege, rather than what the facts are. Accordingly, the demurrer is sustained and defendant is granted 10 days leave within which to file an amended answer.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling Issued By:** **DSB** (Judge's initials) **on** **6-11-12** (Date).

**(20)** Tentative Ruling

Re: ***Douglas and Michele Antonelli Spence Revocable Trust v. Absolute Mortgage Company, Inc. et al.***, Superior Court Case No. 11CECG03096

Hearing Date: **June 12, 2012 (Dept. 402)**

Motion: Default Prove-Up

**Tentative Ruling:**

To deny.

**Explanation:**

The theory of the case advanced in support of default judgment is exactly the opposite of that alleged in the Complaint. The Complaint is based entirely and explicitly based on the allegation that defendant Absolute Mortgage Co., beneficiary of the deed of trust (DOT), unlawfully assigned the DOT, and that the DOT was, subsequent to that assignment, transferred or sold multiple times again. See Complaint ¶¶ 11-12. The Complaint alleges that these assignments were unlawful, rendering the DOT null and void, but never articulates why. In arguing for default judgment, plaintiff does a complete 180, and argues that it was the loan or promissory note that was sold or assigned multiple times, and that the DOT was never assigned or transferred by Absolute, and still remains on title in the name of Absolute. See Prove-Up Brief 4:13-26. The court will not grant a default judgment where the proof is at such variance with the pleading.

The court must conclude that the Complaint fails to state a cause of action to quiet title. The court can only grant default judgment on a well pleaded cause of action. *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1153-1154. Plaintiff clearly demonstrates that Absolute was the lender of $210,000, secured by the deed of trust. See DOT, Exhibit 4. Plaintiff admitted that the note is still out there, that money is still owed. See 12/20/11 RT 10:1-4. Inasmuch as the Complaint only alleges that the DOT, and not the note, was sold or assigned, based on a reading of the Complaint there inference would be that Absolute is still the mortgagee. It is well established that "a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707. "[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney* (1934) 219 Cal. 637, 649. See also *Mix v. Sodd* (1981) 126 Cal.App.3d 386, 390--mortgagor in possession cannot maintain action to quiet title, even though the debt is unenforceable because of the statute of limitations, because "a court of equity will not aid a person in avoiding the payment of his or her debts"].

If we go with plaintiff's theory of the case as expressed in the prove-up brief (that Absolute assigned the note and not the DOT, and they have become separated, rendering the DOT valueless), there still appears to be no viable claim. In the prove-up brief, plaintiff correctly argues that an assignment of the note carries the mortgage or security with it. Civ. Code § 2936; *Carpenter v. Logan* (1872) 83 U.S. 271; *Lewis v. Booth* (1935) 3 Cal.2d 347. A deed of trust is inseparable from the debt and always abides with the debt, and it has no market or ascertainable value, apart from the obligation it secures. See *Buck v. Superior Court* (1965) 232 Cal.App.2d 153, 158.

Inasmuch as the note was assigned, no further assignment of the deed of trust was necessary. Civ. Code § 1084 provides that "[t]he transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." In *Lewis v. Booth* (1935) 3 Cal.2d 345, it was held that an acknowledgment was not necessary to effect an assignment of the trust deed and that the endorsement of the note by the payee was sufficient to transfer the deed of trust without other assignment. In *Santens v. Los Angeles Finance Co.* (1949) 91 Cal.App.2d 197, it was held that the note carries with it the security and the trust deed was merely an incident of the debt and could only be foreclosed by the owner of the note.

Accordingly, when the note was transferred, by operation of law the deed of trust went with it. Plaintiff can only quiet title against an adverse interest. Code Civ. Proc. § 761.020. According to plaintiff's proof, Absolute retains no adverse interest, even if there was no explicit conveyance of the DOT. That's probably why Absolute never responded to this action. It has no interest in the matter.

Furthermore, the Complaint fails to name indispensable parties – those who do have an actual interest in the property and DOT.

In an action to quiet title, plaintiff must name as defendants all persons having an adverse claim to the property, either known to plaintiff or disclosed by the record or apparent from an inspection of the property. Code Civ. Proc. §§ 762.010, 762.060(b). Such persons are thus regarded as "indispensable" party defendants. If the court determines that the absent party is subject to service of process, and "in equity and in good conscience" should be joined as a party to the action, it will order his or her joinder. Code Civ. Proc. § 389(a).

Here, plaintiff names as a defendant the one party who, according to its theory of the case, has no interest in the "PROP". Plaintiff has submitted evidence showing that he has direct knowledge of other parties with an interest in the property, yet fails to name them. The forensic analysis relied on by plaintiff claims that the note was last transferred to U.S. Bank NA. If that is the party that currently owns the loan, it should be joined as an indispensable party. As noted, the current holder of the note would be the beneficiary of the DOT, since by operation of law the DOT was assigned with the note. See Civ. Code § 1084; Civ.

Code § 2936. And the DOT identifies MERS as the beneficiary of the DOT, yet MERS is not named as a defendant.

Finally, the court notes that plaintiff has not produced copies of any of the assignments of the note, which may also indicate that the DOT was assigned with it, for all the court knows. There is no actual evidence that the DOT was not assigned with the note. California law does not require beneficiaries to record all assignments. Instead, Civ. Code § 2934 indicates that an assignment *may* (not *must*) be recorded, and such recording provides "constructive notice of the contents thereof to all persons."

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By: JYH on 6/11/12 .**
(Judge's initials) (Date)

(6)

**Tentative Ruling**

Re: ***Diaz-Albor v. Kings Canyon Unified School District***
Superior Court Case No.: 11CECG04001

Hearing Date: June 12, 2012 (**Dept. 503**)

Motion: By Defendant Kings Canyon Unified School District to strike ¶¶15-17 of the first amended complaint

**Tentative Ruling:**

To grant, with Defendant granted 10 days to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

**Explanation:**

A civil complaint under the Fair Employment and Housing Act (Gov. Code §12960 et seq.) ("FEHA"), must allege that a timely complaint was filed with the Department of Fair Employment and Housing ("DFEH") and that a "right-to-sue" letter was issued. (Gov. Code, §§ 12960, 12965, subd. (b).)

Since the first amended complaint explicitly alleges at ¶¶12, 13, that the DFEH's "right-to-sue" letter stated that Plaintiff Maria Diaz-Albor's right to file a civil action under the FEHA would be tolled during the pendency of the Equal Employment Opportunity Commission's ("EEOC") pending investigation, the allegation at ¶18 that the EEOC issued its own right-to-sue notice on August 22, 2011, is sufficient to allege the end of the tolling period. Consequently, the allegations at ¶¶15-17 are irrelevant, and are stricken. (Code Civ. Proc., §436, subd. (a).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling Issued By:** **A.M. Simpson** (Judge's initials) **on** **6-11-12** (Date).

**Tentative Ruling**

(24)

Re: ***Jesus Carrera v. Judith Case, et al.***
Court Case No. 11CECG04077

Hearing Date: **June 12, 2012 (Dept. 502)**

Motion: Application for Preliminary Injunction

**Tentative Ruling**:

To deny plaintiff's request for preliminary injunction.

To rule on evidentiary objections as follows:

- Defendants' Objections
  - To Declaration of Jith Meganathan, Paragraphs 2 and 3, Exhibits A, B and C, to sustain.
  - To Declaration of Ofra Pleban, Paragraph 8 Exhibit G, to sustain
  - To Declaration of Ofra Plegan, Paragraph 9, page 3:2-4, to overrule (evidence presented for non-hearsay purpose).
  - To Declaration of Dr. Henry W. Zaretsky, Ph.D., Paragraph 11, page 4:12-16, and Paragraph 17, page 7: 4-5:12-16, to sustain as speculative

- Plaintiff's Objections
  - To Declaration of attorney Zachary Redmond, at Paragraphs 2 and 3, encompassing Exhibits A thru D, to sustain
  - To statements in Dr. Moreno's Declaration at ¶4 and 15 as to county's finances, to overrule. Dr. Moreno provides foundation for his knowledge of the County's ability or inability to pay for the very program he was tasked by the Board of Supervisors to pursue (see, e.g., ¶6 and 7).

There being no objection, the court grants plaintiff's request for judicial notice.

**Explanation:**

Plaintiff brings this action under Gov. Code § 91003(a), to enjoin what he argues is a violation of the "Political Reform Act of 1974." He argues that Supervisor Case had a financial conflict of interest in taking part in the Board's vote on September 20, 2011. Gov. Code § 87100 prohibits any public official from using his official position to influence a governmental decision "in which he knows or has reason to know he has a financial interest."

Plaintiff has not adequately shown that Supervisor Case knew or had reason to know she had any conflicting interest, since her financial interest in Saint Agnes Medical Center ("SAMC") is only indirectly related to the official act in question regarding the Low-Income Health Program ("LIHP"), and it is better characterized as only tangentially related, at best. Community Medical Center ("CMC") was the only hospital directly involved or affected by the LIHP application.

There is credible evidence presented by Director Moreno that the vote in question was directly connected only to CMC, with no connection with SAMC that would even implicate the prohibition of Gov. Code § 87100. Dr. Moreno's testimony establishes that the plan was specifically tailored to "reduce the strain on the MISP program" served by CMC (not SAMC), and that it anticipated this would be accomplished by transferring the MISP patients (i.e., those already served by CMC) to the LIHP.

His testimony also establishes that the funding options being pursued specifically involved only those funds already contracted to CMC, in a plan to restructure (renegotiate) the arrangement such that those same funds and the matching federal funds would be paid to CMC. These facts, taken together, show that neither the Board, nor the Department of Public Health, nor CMC considered this decision as impacting another hospital (namely taking patients from SAMC), but rather that it would service patients already being served by CMC.

At most, Dr. Zaretzky's testimony is that SAMC *might* lose patients to the LIHP and thus experience lowered costs. Even if his calculations are deemed reasonable as to SAMC's costs being reduced by the requisite minimum of $250,000 <u>if</u> they lost indigent patients, it is speculative to say that SAMC would experience any such reduction given the County's hopes that the LIHP would service patients already served by CMC.

The tangential relationship of SAMC to the LIHP application process and the plans for the program reduces the probability that plaintiff will be likely to prevail in establishing that Supervisor Case knew or should have known that SAMC was in any way impacted by the LIHP application, such that she knew or should have known she had a conflict of interest in voting on the issue.

Plaintiff also has not established that the LIHP would have been implemented but for Case's vote. Gov. Code §91003(b) requires that in considering whether or not an official act should be restrained pending final adjudication, and ultimately set aside as void, the court must not only find that a violation occurred but <u>*also*</u> that "the official action might not otherwise have been taken or approved" but for that act. If plaintiff does not show he is likely to prevail in establishing this second prong, then the injunction should not be granted.

In this case, the "official action" is the vote that occurred on September 20, 2011. First, it is foreseeably likely that the vote would have still taken place, even without Supervisor Case's involvement, given Director Moreno's testimony about the impasse in negotiations with CMC over renegotiating the contract and the fact that it was Director Moreno's job to bring such concerns to the Board for further decision. Whether or not Supervisor Case took part in the vote, Director Moreno's testimony establishes that he would have needed to come to the Board with his concerns, since he could proceed no further without the Board's direction.

Since it is likely the vote would still have taken place, the pertinent question is whether this action, here the vote to authorize withdrawal, "might not otherwise have been approved" but for the participation of Supervisor Case. Plaintiff has produced no evidence that the vote would have been in favor of proceeding with the application without Supervisor Case's involvement. If her vote is not counted, then there was a tie vote. It does not seem reasonably likely that if Supervisor Case had recused herself the board would have left it at that impasse, since Director Moreno needed direction as to how to proceed with the application process now that the funding source that had been relied upon was not available. It would be unreasonable to assign Moreno the task of continuing with the application without giving him direction as to a funding source.

This obviously begs the question of *how* he would be able to proceed *successfully to final approval*, given his testimony that <u>he</u> was unaware of any other funding source. Plaintiff suggests that the Board perhaps could have moved funds from one budget line item to another, but this is entirely speculative. Also, the mere fact that two Supervisors voted against withdrawing the application is not proof that there were other funds that could be used for the LIHP. Clearly, other factors might motivate a "no" vote, even if there was no money available.

On balance, it is likely that a vote would have happened, even if Supervisor Case had recused herself, and it is *at least* as reasonable to find that the outcome of the vote would have been the same given the funding problems as it is to assume that the vote would have gone as plaintiff wished. At the very least, it is entirely too speculative to assume *how* the vote would have gone had Case abstained from voting, especially since no evidence at all has been presented on this issue.

Finally, even if the court assumes, *arguendo*, that the vote would be taken and would be in favor of continuing the application process that does not lead to an inescapable conclusion that the LIHP would have been implemented, as plaintiff argues. Plaintiff has produced no evidence that the application would have or even <u>could</u> have made it successfully to final approval and implementation, given the funding issues. Plaintiff argues that defendants have not shown that there was no funding source, but they have at least produced evidence that supports this inference, whereas plaintiff, who bears the burden on this motion, has not produced anything beyond speculation and argument.

Public policy considerations come into play when a preliminary injunction is sought against a public agency or officer. A "significant" showing of irreparable injury is required because there is a "general rule against enjoining public officers or agencies from performing their duties." [*Tahoe Keys Prop. Owners Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471; *O'Connell v. Sup.Ct. (Valenzuela)* (2006) 141 Cal.App.4th 1452, 1464--principles of comity and separation of powers "place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other departments or officials"]

Furthermore, even where the plaintiff may have an inadequate legal remedy and/or irreparable damage is threatened, an injunction may not issue if the court is convinced that the party is unlikely to prevail on the merits. [*San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller)* (1985) 170 Cal.App.3d 438, 442] On this motion, plaintiff has not established that he will prevail in establishing that Supervisor Case knew or should have known she had a conflict of interest due to her financial interest in SAMC. Plaintiff has not adequately established that the vote would have been different had Supervisor Case not voted, nor has he shown he is likely to prevail on establishing that had the vote been different the LIHP would have been successfully implemented.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

**Tentative Ruling Issued By:** **DSB** (Judge's initials) **on** **6-11-12** (Date) .